

BEFORE THE
SURFACE TRANSPORTATION BOARD

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URGENT ISSUES IN FREIGHT RAIL SERVICE

COMMENTS OF THE ASSOCIATION
OF AMERICAN RAILROADS

Pursuant to the Notice of Public Hearing (“Notice”), served on April 7, 2022, the Association of American Railroads (“AAR”), on behalf of its freight railroad members, provides these comments related to rail service.¹ As recognized in the Notice, the railroad industry is facing a challenging operating environment, with multiple causes. AAR’s members look forward to engaging directly with the Board at the hearing regarding these challenges and the specific steps they are taking in response. AAR’s comments will focus on broad operating concerns common to all Class I freight railroads.

I. The Supply Chain Disruptions Resulting from the Pandemic Are Unprecedented.

Over the past two years, supply chain disruptions stemming from the COVID-19 pandemic have become non-stop and cascading.² Rail volumes have varied widely from historical trends as the world economy shut down and has reopened in fits and starts. As the

¹ See *Urgent Issues in Freight Rail Service*, EP 770 (Apr. 7, 2022).

² See Notice at 2 (“the Board appreciates that the pandemic has caused significant volume fluctuations, which have created great uncertainty and other challenges”).

Board is aware, rail service issues come in many different kinds, with many different causes. In a complex global transportation network, the causes of degraded service are often overlapping and can be beyond the control of any one railroad. Unfortunately, recent global shipping disruptions have vividly illustrated this reality.

Specifically, the COVID-19 pandemic has impacted global manufacturing capability, demand, and consumption patterns on a continuing basis since early 2020. COVID-19 cases on steamships impacted crew and vessel operations; cases at ports and manufacturers led to slowdowns and shutdowns (including at some of the world's largest container ports in China, with shut-downs still occurring); fear of contracting the disease led millions of Americans to remove themselves from the labor force; and millions more were involuntarily removed when their employers shut down or shrunk their operations across the economy. Additionally, the variation in state and local stay-at-home orders throughout the course of the pandemic meant certain industries and/or their suppliers were shut down as non-essential.³ This variability

³ The Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA") led federal efforts to identify essential workers with the intent of "giv[ing] guidance to State, local, tribal, and territorial jurisdictions and the private sector on defining essential critical infrastructure workers. Promoting the ability of such workers to continue to work during periods of community restriction, access management, social distancing, or closure orders/directives is crucial to community resilience and continuity of essential functions." CISA, Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response, Version 1.0 (Mar. 19, 2020). Unfortunately, this guidance underwent multiple versions to identify and clarify "essential workers" as the impacts on certain industries and suppliers of COVID-related orders were better understood. See Easterly, Jen, Director, CISA, Advisory Memorandum on Ensuring Essential Critical Infrastructure Workers' Ability to Work During the COVID-19 Response, (Aug. 10, 2021) ("This 4.1 Version is the latest iteration of the guidance, which has evolved over time based on lessons learned from the pandemic and as additional essential workers returned to work. ... The list identifies workers who conduct a range of operations and services that may be essential to continued critical infrastructure operations ... [and] includes workers who support crucial supply chains and enable cyber and physical security functions for critical infrastructure.")

across different regions lead to unpredictability in production and volumes. While the public health threat of the pandemic is receding, the impacts of these actions and reactions on commerce remain.

When the pandemic first hit in March and April 2020, consumer spending took an immediate hit. Soon, though, with many in lockdown and physical retail stores closed, consumer spending shifted from services to goods. In fact, by June 2020, consumer spending on goods was higher than it was in January 2020, and it kept trending higher from there. Meanwhile, consumer spending on services lagged: not until June 2021 did it recover to where it had been in January 2020. A global pandemic was unprecedented in modern times, and few firms, railroad or otherwise, had reason to see these abruptly changed consumer spending patterns coming. Additionally, at the beginning of the pandemic, retailers found themselves with huge amounts of goods they could not sell, causing their inventory-to-sales ratio to rise sharply in March and April 2020. When those goods were sold or otherwise liquidated, they were often not replaced—largely because retailers thought consumers would not be purchasing much—and the inventory-sales ratio fell sharply. As the U.S. economy rapidly recovered, demand for all kinds of goods rose sharply. Retailers started playing catch-up and increased their orders as well.

Similar to consumer spending, rail traffic fell sharply when the pandemic began, but rail volumes have since rebounded. The most notable increase has been in rail intermodal. Last year was a tale of two halves, with the first six months of 2021 seeing record-breaking highs, then volume cooling in the second half as global supply chain challenges persisted. But overall, 2021 saw volume rise 4.9% over 2020, making it the second largest year by volume ever.

The significant gains in rail intermodal volumes parallel gains in activity at our nation's ports, which in turn are rooted in the rapid recovery in demand for consumer goods. Ocean carriers cancelled countless sailings in the first half of 2020 because of weak demand, then found themselves being called to ramp-up more quickly than was realistically possible in the second half of 2020 to meet the surge in demand. Today, there are still dozens of steamships waiting to offload at the Los Angeles and Long Beach ports. Those backups have also led to shifts in ports of call, sending some vessels to the East and Gulf Coast ports, where backups are also occurring. Roughly half of U.S. intermodal volume consists of imports and exports, and there is a very close correlation between port volumes and U.S. intermodal volumes. So as activity at America's ports rises and falls, so do rail intermodal volumes.

The economic rebounds are not confined to goods moving intermodally. For example, 2021 carloads of grain reached 1.21 million, the highest since 2008 in absolute terms. Chemicals also had a record year in 2021, and railroads moved more chemicals in the month of March 2022 than ever before. Other freight, like automobiles and auto parts, saw a slight decline, as microchip shortages caused production cuts. The unpredictable nature of the recovery has resulted in impacts across the global supply chain. These impacts are now compounded by rising inflation and the war in Ukraine, which are injecting even more uncertainty into the economy. While railroads have worked diligently with their customers and supply chain partners to manage these challenges, the railroad industry is part of a highly complex, interdependent supply chain ecosystem, and cannot isolate itself from all impacts.

II. Railroads are Working Hard to Address Their Workforce and Equipment Needs.

As the economy roars back with increased stress on the supply chain, many industries face challenges hiring more employees to meet the demand surge on the system. As the Board recognizes, “carriers have reported hiring difficulties—difficulties that are not restricted to the rail industry.”⁴ The Bureau of Labor Statistics counted 489,000 job openings in February 2022 in the transportation, warehousing, and utilities industries.⁵ Indeed, the trucking industry, railroads’ largest competitor, faced a truck driver shortage of just over 80,000 drivers in 2021 (a historic high), which is predicted by some to reach 160,000 by 2030.⁶ Warehouses are also experiencing labor shortages, with one survey reporting that 73% of businesses said they have problems attracting employees, up from 26% in 2021.⁷

The manufacturing sector is also experiencing a tight labor market with job growth in the sector rising in 2021 at the highest pace since 1994. Manufacturers have had about 800,000 job openings or more—a very elevated rate—for 10 straight months, and according to the National Association of Manufacturers’ 1Q2022 Outlook Survey, 79% of respondents indicated that the inability to attract and retain quality employees remains one of the primary

⁴ Notice at 2.

⁵ Bureau of Labor Statistics, Job Openings and Labor Turnover Survey, available at: <https://www.bls.gov/news.release/jolts.htm>.

⁶ American Trucking Associations, Driver Shortage Update 2021, (Oct. 2021) available at: https://www.trucking.org/sites/default/files/2021-10/ATA%20Driver%20Shortage%20Report%202021%20Executive%20Summary.FINAL_.pdf.

⁷ Instawork, State of Warehouse Labor: Staying Flexible in 2022, available at <https://info.instawork.com/state-of-warehouse-labor>.

challenges.⁸ The chemical industry also does not expect employment to reach pre-COVID levels until 2023.⁹ Simply put, the inability to attract workers is economy-wide.¹⁰

Railroads face the same challenges, notwithstanding that the railroads employ some of America's most highly compensated industrial workers. In 2020, the average U.S. Class I freight rail employee earned total compensation of \$135,700. By contrast, the average compensation of a U.S. employee in 2020 was \$87,000, just 64 percent of the rail industry's compensation. Some suggest that if railroads had employed extra workers pre-pandemic, they would not be facing labor shortages now. The number of workers on the rolls pre-pandemic does not change the number of workers that were needed to operate during the pandemic; extra workers pre-pandemic would simply have increased the number of workers that were furloughed during the pandemic. Bringing workers *back* to work has been the challenge, and not just for railroads: the *entire* supply chain is struggling to find workers. As noted in one employment report, with COVID restrictions disrupting work and school schedules, more workers are seeking jobs with flexible scheduling—a benefit simply not possible with many railroad operating jobs. As many as 25% of U.S. workers are now engaged in gig economy jobs.¹¹ These shifting dynamics in the

⁸ See National Association of Manufacturers, Outlook Survey, available at: <https://www.nam.org/2022-1st-quarter-manufacturers-outlook-survey/>.

⁹ See Martha Gilchrist Moore, 2022 Chemical Industry Outlook: Upward Momentum Builds, available at: <https://www.chemicalprocessing.com/articles/2022/2022-chemicals-industry-outlook-upward-momentum-builds/>.

¹⁰ See Federal Open Markets Committee, Minutes of the March 15-16, 2022 Meeting, at 10 (“all participants concurred that the U.S. economy was very strong, with *an extremely tight labor market....*”) (emphasis added).

¹¹ See Instawork, State of Warehouse Labor: Staying Flexible in 2022, available at <https://info.instawork.com/state-of-warehouse-labor>; see American Trucking Associations, Driver Shortage Update 2021, (Oct. 2021) available at: https://www.trucking.org/sites/default/files/2021-10/ATA%20Driver%20Shortage%20Report%202021%20Executive%20Summary.FINAL_.pdf (noting that

workforce increase the employment challenges railroads and our supply chain partners are facing.

Regardless, to entice more skilled labor to the workforce, railroads are offering hiring bonuses, financial payments to refer-a-friend, and other incentives. Railroads are also encouraging their current employees to help meet demand, including through vacation buybacks and incentive payments to move to high-demand regions of the network. As the economy works through these times of unprecedented change, the railroad industry will continue to find creative ways to meet its workforce needs.

It bears noting, however, that to do so, railroads will need a constructive partner at the Federal Railroad Administration (“FRA”) in approving innovative and efficient ways to train and certify new employees. Hiring and training new railroad operating employees is a time and resource-intensive process, and is heavily regulated by FRA at 49 C.F.R. Parts 240, 242, and 243, among others. Under relevant FRA regulations, persons hired as train crew members must be able to first pass vision and hearing examinations, comply with applicable federal drug and alcohol testing requirements, and provide their driver’s licensing background information. Before performing duties as a qualified train crew member, they must undergo rigorous classroom, field, and on-the-job training, and be able to pass applicable railroad operating and safety rules exams. They must also demonstrate to railroad managers they can perform their real-world duties in a safe and regulatory-compliant manner and show that they are qualified on the physical characteristics of the territories they operate over. All told, this process

one of the challenges in hiring for trucking companies is the “[l]ifestyle issues, notably time away from home, especially in the longer-haul market.”).

generally takes a minimum of several months before an employee is considered qualified to perform their duties under railroad rules and federal regulations, and the overall path to becoming a conductor and eventually a certified locomotive engineer could entail years. Even during a time of rapid hiring to meet demand, the particularities of the railroad operating and regulatory environment present additional challenges not faced by many other industries.

Ensuring quality service also means having the equipment to move the goods. To meet demand, railroads are pulling equipment out of storage, activating their reserve fleets, and prepositioning resources where needed regionally. Railroads are also working with their customers to manage the cars needed. However, when demand grows unexpectedly and rail capacity becomes strained, any non-forecasted increases in customer car orders further constrain the network, which is already congested. Such unexpected increases in demand and customer car orders mean that dwell time will increase and network velocity will decrease. This is, unfortunately, part of what is contributing to service challenges today.¹² Increasing the number of cars flowing into the system when the system is already stressed, can result in or exacerbate existing service issues because the fluidity of the entire network is impacted.

III. The Board Should Take Care to Do No Harm in This Dynamic Phase of Pandemic Recovery.

AAR's members welcome the Board's Notice of Hearing because it presents the opportunity to help educate and inform the Board and the public about the complexity of these challenges and the ongoing commitment of the railroads to meeting them, as outlined briefly

¹² Surface Transportation Board, Rail Service Data, available at: <https://www.stb.gov/reports-data/rail-service-data/#railroads-tab-content-1->.

above. However, because several stakeholders, including most prominently the Department of Agriculture, propose various regulatory interventions, AAR is compelled to end this comment by briefly cautioning against several of the more opportunistic suggestions.¹³ AAR urges the Board to focus on identifying whether any regulatory intervention requested is narrowly tailored to, and likely to positively affect, the immediate service challenges facing the industry.

A. Additional Reporting Requirements Will Not Improve Service.

With regard to collecting more data from railroads, be it first-mile/last-mile data or more general service data, more data does not mean more actionable information or more possible solutions. The Board should ensure it identifies a specific problem to be solved by collection of specific data, narrowly tailors any data collection to address that problem, and balances the usefulness of the information required with the burden imposed.¹⁴ Specifically, as the Board has recognized in the past, reporting requirements impose real world costs on railroads and service reporting diverts railroad operating personnel from their principal mission of running the railroad.¹⁵ Before the Board adopts any new reporting rules, it should be mindful of the costs that ongoing operating data reporting imposes and how those costs can impact service.

¹³ See Letter from Michael J. Seyfert, President and CEO, National Grain and Feed Association, to Hon. Martin Oberman, Chairman, STB (Mar. 24, 2022) (“NGFA Letter”); Honorable Thomas J. Vilsack, U.S. Dep’t of Agric. Letter, Mar. 30, 2022, *Reciprocal Switching*, EP 711 (Sub-No. 1), et al. (“USDA Letter”).

¹⁴ See FMLM AAR Comments at 4-11; AAR Comments EP 724-4 at 9-11.

¹⁵ See *Joint Petition for a Further Service Order*, SO 1518 (Sub-No. 1) et al., slip op. at 4 (STB served July 31, 1998) (“We recognize, however, that information filing can be burdensome, particularly as it is currently configured, and that it can divert resources away from the transportation issues....”).

Furthermore, if the Board undertakes further reporting requirements for specific service issues, as AAR noted previously, it should do so temporarily.¹⁶ The Board has noted in the past that “as service improves, the appropriate government response in a service oversight proceeding such as this one ought to be to intervene less rather than more.”¹⁷ If reporting of more frequent or more granular data (such as for specific commodities or regions), is determined necessary to resolve a specifically identified problem, such reporting should automatically sunset after a specified period of time.¹⁸ Diverting operating resources away from operations to prepare and compile new reports can adversely impact the very service that is of concern to the Board.

B. Penalizing Rail Carriers for Private Railcar Movements Will Exacerbate Service Issues.

The proceeding regarding the use of private railcars, EP 768, has nothing to do with improving the fluidity of the network. There, the private railcar owners petitioned the Board to impose charges on railroads whenever waybilled private railcars moving “in transit” have not moved from one “car location message” (“CLM”) location to the next within 72 hours, for any reason.¹⁹ The movements of private railcars have nothing to do with the service disruptions the nation’s rail network is experiencing right now. Private railcar penalties will not resolve

¹⁶ See AAR Comments, EP 724-4 at 14-16.

¹⁷ *Rail Service in the Western United States*, EP 573, slip op. at 4 & fn. 9 (STB served Sept. 22, 1998).

¹⁸ See AAR Comments, EP 724-4 at 14-16.

¹⁹ See Petition for Rulemaking, Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads, EP 768, at 24.

crew shortages, or unexpected demand fluctuations, or the market impacts of the war in Ukraine—nor does USDA explain how they will.

As noted in the AAR’s reply to the petition, the private railcar proposal is not within the Board’s authority.²⁰ Moreover, the proposal would frustrate the free flow of commerce by creating incentives for the inefficient handling of railcars.²¹ Because the proposal imposes fees on cars not moved to the next CLM location within 72 hours, it would incentivize railroads to take operational measures for the sole purpose of moving cars. While there may be valid operational reasons for not moving the private railcars within a 72-hour period—reasons that actually enhance efficiencies in the network—the movement will be made to avoid the penalties. Such actions would adversely affect other cars in the same trains or blocks or using the same rail infrastructure. Such perverse incentives would force an otherwise rational actor to prioritize inefficiency over what may be best for overall network fluidity. This is anathema to providing better service on the system.

C. A Forced Switching Rule Cannot Solve Current Service Issues.

A forced switching rule simply cannot improve poor service arising from the complex impact of a global pandemic on consumer purchasing, supply chain fluidity, worker preferences, and rapidly changing global and national economies.²² Indeed, even setting the pandemic and its impact on supply chains aside, the record in the switching proceeding contains *no* evidence that service will be improved through forced switching. Instead, it shows that forced switching

²⁰ See AAR Reply to Petition, EP 768, at 3-11.

²¹ See AAR Reply to Petition, EP 768, at 16.

²² See USDA Letter at 2.

would impose serious operational burdens by increasing the number of required movements—burdens that would erode service and productivity gains achieved by the industry in recent decades.²³ If deployed in the wrong place the proposal will *create* service issues.

Forced switching requires abandonment of relatively streamlined, efficient operations and replacing it with a series of additional touchpoints. By imposing a switch from the serving carrier to the alternative long-haul carrier, forced switching creates additional points of delay and potential failure by layering on that short-distance move on top of the existing operations, which could actually make service worse. Every additional touchpoint is a new opportunity for failure or delay, increasing exposure to further service issues.²⁴

These risks are compounded in a network industry, where delays in one part of the supply chain reverberate throughout. With forced switching, one shipper's forced access order could generate widespread, but dispersed, negative externalities within other parts of the network. The burdens of increased congestion, transit time, and inefficient routing then will be borne by all users of the network, including other shippers and passenger rail service. Introducing inefficiency in one area through a forced switch could negatively affect other areas, and the ability to provide efficient, reliable service there.

²³ See AAR Supp. Comments, EP 711-1, at 25-27.

²⁴ See AAR Supp. Comments, EP 711-1, at 37-40.

D. Other Suggested Interventions are Outside the Board's Authority and Unrelated to the Service Concerns Raised in the Board's Notice of Hearing.

Some have suggested that the Board take actions like “suspending increases to rates and additional fuel surcharges” and investigating demurrage charges.²⁵ The regulation of rates is strictly limited by the statutory authority of the Board. Rate suspension authority was removed from the statute in 1995, with the passage of the ICC Termination Act.²⁶ The Board may determine the maximum reasonable rate of a rail movement only on complaint, only if there is market dominance, and only if the rate charged is proven to be unreasonable.²⁷

Similarly, suspension of fuel surcharges—i.e., a separately identified component of the total rate that is charged for the transportation involved and is designed to recoup increases in the carrier's fuel costs – would violate the Board's own rules and railroads' due process rights. In 2007, the Board established a “safe harbor” for fuel surcharge programs.²⁸ The Board's safe harbor remains in effect today and railroads are entitled to rely upon it.²⁹ More to the point, prohibiting railroads from recouping their increased fuel costs is not likely to have any positive impact on service.

²⁵ USDA Letter at 2.

²⁶ See Report of the Committee on Transportation and Infrastructure on H.R. 2539, ICC Termination Act of 1995, H. Rpt. 104-311, at 97, 128, 220-222 (Nov. 6, 1995).

²⁷ See 49 U.S.C. §§ 10701, 10704, 10707. The suggestion to unilaterally suspend all rate increases would not only violate the statute, but would sweep in rates over which the Board does not even have jurisdiction, like contract rates, rates under 180% R/VC, and rates over which the carrier does not have market dominance.

²⁸ See *Rail Fuel Surcharges*, EP 661 at 11 (STB served Jan. 26, 2007).

²⁹ See *Rail Fuel Surcharges (Safe Harbor)*, EP 661-2 (STB served Aug. 29, 2019); *Cargill, Inc. v. BNSF Ry.*, NOR 42120, at 7, 9 (STB served Aug. 12, 2013) (carriers are “entitled to rely on the HDF Index as a proxy to measure changes in their internal fuel costs”).

Some also suggest action be taken with regard to demurrage fees.³⁰ As the Board knows well, it recently completed a suite of reforms to the demurrage rules.³¹ These decisions placed new requirements on railroads, including minimum information requirements to assist rail users in reviewing and identifying errors in demurrage charges, and a policy statement to guide practitioners on how the Board would review disputes in the future. Importantly, the Board reiterated its position that “[t]he question of whether specific demurrage charges are lawful depends on an array of fact-specific factors (including, for example, documentation supporting the charges) that would need to be determined in the context of an individual dispute.”³² An entity that believes that it has a legitimate basis for disputing demurrage charges should file a complaint. A broad investigation into demurrage practices is unconnected to current service challenges, and a waste of public and private resources.

CONCLUSION

By convening a public hearing, the Board is providing an important opportunity for the Board and interested stakeholders to learn about the scope, nature, and causes of service challenges the rail network confronts. This education is essential. As the hearing will reveal, the railroad industry is working hard to manage challenges in today’s operating environment, but those challenges are not exclusively in the rail industry’s control. While some have and will seize this opportunity to press their own self-serving regulatory agendas, there is no regulatory

³⁰ See USDA Letter at 2.

³¹ *Pol’y Statement on Demurrage & Accessorial Rules & Charges (Policy Statement)*, EP 757, (STB served Apr. 30, 2020); *Demurrage Billing Requirements*, EP 759 (STB served Apr. 6, 2021); *Exclusion of Demurrage Regulation From Certain Class Exemptions*, EP 760 (Feb. 28, 2020).

³² *Demurrage Billing Requirements* at 9; see *Policy Statement* at 15.

intervention that can magically remove the supply chain and workforce challenges railroads (and many other industries) are managing. Successful navigation of all unknowns that lie ahead will require flexibility, innovation, and determination – characteristics that the rail industry and its employees have demonstrated many times in the past. As we move forward, freight railroads will remain in close collaboration with their customers and employees, policymakers, and others to ensure that the rail system can meet the nation’s freight transportation needs safely, reliably, and cost effectively.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'JD' or similar, with a stylized, cursive style.

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